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No. 308

In the Supreme Court of the United States

OCTOBER TERM, 1968

JAMES J. RITTER, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In 1957, the petitioner was Regional Controller for the Data Processing Division, Western Region, of International Business Machines Corporation ("IBM"), and was located in San Francisco, California (Pet. 22a). When IBM decided to relocate its Regional Headquarters at Los Angeles, California, it asked certain employees, including petitioner, to move there (Pet. 26a, 31a). Petitioner could have remained in the San Francisco area, but in a lesser position, as a salesman or account executive. Although the company did not pressure him, petitioner accepted the transfer and moved on September 17, 1958 (Pet. 22a, 32a).

IBM paid petitioner an aggregate of $11,249 in connection with the move, $4,177 as reimbursement for expenditures he had incurred and $7,072 pursuant to a guarantee that if the proceeds of the sale of his San Francisco home did not reach a particular appraised value, it would pay him the difference (Pet. 22a, 24a).

The Commissioner of Internal Revenue allowed as regular employee travel expenses or nontaxable reimbursements of direct moving expenses (*i.e.*, the expenses of moving himself, his family and his household goods) $2,723 of the $4,177 which petitioner had received (Pet. 3a, 22a–23a). The remaining $1,454 in reimbursements for the indirect expenses set forth below was held to be includible in petitioner's taxable income and nondeductible (Pet. 3a, 23a):

(a) Real estate appraisal of San Francisco residence	$130
(b) Advertising such residence for sale	16
(c) Various charges pending sale, after move to Los Angeles (taxes, interest and upkeep, watering and gardening)	331
(d) Closing and miscellaneous other costs on purchase of Los Angeles residence	500
(e) Installation of carpeting in Los Angeles home	133
(f) Miscellaneous expenses of move	100
(g) Remaking and rehanging draperies in Los Angeles residence	245
	$1,454

The $7,072 paid to petitioner on the guarantee represented the difference between the $31,666 net petitioner obtained from the sale of the San Francisco residence[1] and a $38,738 "appraised value" as defined by IBM (Pet. 24a). This "appraised value" was an average of the two highest of three appraisals made in March 1958[2] (Pet. 34a–35a). The property was offered for sale for more than six months before a firm offer of $34,000 was received in October 1958 (Pet. 36a). The Commissioner disallowed petitioner's treatment of the $7,072 as part of the sales price of the house from which he had merely derived capital gain, ruling that this payment constituted ordinary income (Pet. 20a–21a, 22a).

In the resulting refund suit, the Court of Claims (two judges dissenting in part) sustained the Commissioner's ruling in all respects.[3]

1. The amounts IBM paid petitioner as reimbursement for indirect moving expense were gross income to him. Section 61(a) of the 1954 Code (Pet. 1b) states that "* * * gross income means all income from whatever source derived * * *." The term "gross in-

[1] The house was sold for $34,000 and the $2,334 difference between net proceeds and sales price was attributable to brokerage commissions, legal costs and a premium required on prepayment of the mortgage principal (Pet. 24a).

[2] The three appraisals were: $32,450, $38,225 and $39,250 (Pet. 34a–35a).

[3] Judge Davis would have allowed an expense deduction for the $1,454 in indirect expenses, and Judge Skelton would have allowed an expense deduction for $384 of the indirect expenses (Pet. 18a–20a). The court was unanimous, however, in holding that the $7,072 received on the guarantee was ordinary income to petitioner.

come" is "broad enough to include * * * any economic or financial benefit conferred on the employee as compensation whatever the form or mode by which it is effected." *Commissioner* v. *Smith,* 324 U.S. 177, 181; see *Old Colony Tr. Co.* v. *Commissioner,* 279 U.S. 716; *Helvering* v. *Clifford,* 309 U.S. 331; *Commissioner* v. *Glenshaw Glass Co.,* 348 U.S. 426; *Commissioner* v. *LoBue,* 351 U.S. 243. That Congress intended gross income to include an employee's reimbursements of expenses is implicit in Section 62(a)(2)(A) of the 1954 Code (Pet. 1b–2b), which allows deductions from gross income for specified business expenses of an employee for which he has been reimbursed by his employer;[4] if such reimbursement were not income, there would be no occasion to permit the deduction.

The holding of the court below that the payments from IBM to its employee fall within the statutory concept of gross income is in accord with all appellate decisions which have considered this and related questions. *England* v. *United States,* 345 F. 2d 414 (C.A. 7), certiorari denied, 382 U.S. 986 (reimbursed moving expenses of transferred employee); *United States* v. *Woodall,* 255 F. 2d 370 (C.A. 10), certiorari denied, 358 U.S. 824 (reimbursed moving expenses of new employee); *Koons* v. *United States,* 315 F.

[4] Reimbursements of employees for moving expenses are not covered by Sections 101–122 of the 1954 Code, which deal with "Items Specifically Excluded from Gross Income." The only exclusionary provisions which could conceivably have any relevance are Section 102 ("Gifts") and 119 ("Meals or Lodgings Furnished for the Convenience of the Employer"); and petitioner does not contend that they are applicable.

2d 542 (C.A. 9) (reimbursed moving expenses of new employee). Only the Tax Court has held that such receipts are not gross income. *Cavanagh* v. *Commissioner,* 36 T.C. 300 (1961), nonacquiescence, 1962–2 Cum. Bull. 6; *Starr* v. *Commissioner,* 46 T.C. 743.[5]

Petitioner argues (Pet. 6–9), however, that these sums should not be considered as income because if there is offset against the payment from his employer his personal expenditures that he would not have incurred but for the conditions of his employment, he had no net gain. But Congress expressly prohibited taxpayers from deducting any "personal, living, or family expenses" (1954 Code, Section 262), and it did not intend this provison to be circumvented by permitting an employee to exclude from his income reimbursement for personal expenses, even though such expenses were required by his employer and were essential to retaining his employment. For example, a corporation may require its salesmen or executives to don a clean shirt every day, to wear expensive suits, to drive a certain make of automobile, or to live in a fashionable suburb; but no part of the reimbursement for these personal costs would be excludable from income. Similarly, the payments here constituted IBM's reimbursement of the personal expenses of himself and his family.[6]

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[5] *Starr* is now on appeal to the Court of Appeals for the Tenth Circuit, No. 9370.

[6] Because the expenses were personal, they are not analogous to an employer's furnishing tools or office supplies for an employee's use on the job.

2. Nor are the expenses deductible. Almost all relate to the maintenance and sale of the residence formerly occupied by petitioner and his family and the acquisition and furnishing of a new residence. Petitioner's employer did not require such expenditures—petitioner and his family alone required them for their personal comfort. They are thus not deductible as "ordinary and necessary expenses * * * in carrying on any trade or business" (Section 162(a)) or as "traveling expenses * * * while away from home in the pursuit of a trade or business" (Section 162(a)(2)). The court below properly characterized petitioner's expenditures as nondeductible "personal, living, or family expenses." Its decision is in accord with all appellate courts which have considered the question. *England* v. *United States, supra*; *United States* v. *Woodall, supra*; *Commissioner* v. *Mendel*, 351 F. 2d 580 (C.A. 4); *Koons* v. *United States, supra*; *Light* v. *Commissioner*, 310 F. 2d 716 (C.A. 5); *York* v. *Commissioner*, 160 F. 2d 385 (C.A.D.C.). The Tax Court likewise has disallowed deductions for expenses incurred in the upkeep and sale of a former residence. *Wilson* v. *Commissioner*, 49 T.C. 406. See also *Commissioner* v. *Flowers*, 326 U.S. 465; *Steinhort* v. *Commissioner*, 335 F. 2d 496 (C.A. 5); *Commissioner* v. *Stidger*, 386 U.S. 287.

3. Contrary to petitioner's contention (Pet. 11–12), the position of the Service in this case is not inconsistent with the position of Rev. Rul. 54–429, 1954–2 Cum. Bull. 53, which excludes from income reimbursements for "direct" moving expenses—the cost of

transporting the employee himself, his family and his personal belongings. Petitioner argues that if such reimbursements are not income, it is arbitrary to include as income reimbursements for "indirect" moving expenses.[7]

By the Revenue Ruling, the Service has in effect indicated its willingness to treat as nontaxable the reimbursements for the cost of transporting the employee's immediate family and personal belongings to his new place of employment. While it may be that it would not have been unreasonable for the Commissioner to refuse to grant favorable tax treatment for such items, it was not arbitrary or capricious for the Commissioner to differentiate direct costs from the clearly personal expenses of hanging drapes, laying carpets, and purchasing a new home. See *England* v. *United States, supra.* The drawing of a rule of practical administration in an area of limitless factual variations, where many different lines could be drawn by individual courts, is entitled to respect, even though

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[7] Examples of indirect moving expense for which reimbursement is taxable are set forth in Rev. Rul. 65–158, 1965–1 Cum. Bull. 34:

> * * * preliminary trips to the new place of employment to locate a suitable residence; the amount by which the net selling price of the employee's residence at the former place of employment fell below its appraised value; fees incurred in connection with the sale of that residence and the purchase of a different residence at the new place of employment; charges for connecting and disconnecting appliances and utilities; alteration and installation of rugs and draperies at the new residence; drivers and auto licenses required by the State to which the employee moved; and similar costs related to the move.

alternatives and improvements might be available. *United States* v. *Correll*, 389 U.S. 299, 306–307.

4. The 1964 enactment of Section 217 of the 1954 Code (subsequent to the year at issue), allowing, under limited circumstances, deductions for moving expenses of an employee and his family and their household goods, whether or not he is reimbursed by his employer, supports the Government's position rather than that of petitioner. It demonstrates that Congress recognized that a rational distinction could be drawn between the direct expenses of such a move and the other personal expenses that might be involved.[8]

5. The payment covering the difference between the appraised value of petitioner's house and net proceeds from its sale was ordinary income; it was neither a reimbursement for a deductible expense nor part of the proceeds of the sale of a capital asset. On this issue the decision of the court below is unanimous and is in accord with the current holdings of all other courts that have considered this question. *Bradley* v. *Commissioner*, 324 F. 2d 610 (C.A. 4); *Baum* v. *United States* (M.D. Tenn.), decided May 3, 1968 (21 A.F.T.R. 2d 1401); *Loflin* v. *United States* (W.D. Tenn.), decided March 8, 1967 (19 A.F.T.R. 2d 1091); *Harvey* v. *Commissioner*, decided June 5, 1967 (26 T.C.M. 565);[9] *Hayes* v. *Commis-*

[8] If petitioner were correct that personal expenses incurred in the course of moving were deductible under Section 162 of the 1954 Code (Pet. 3b), not only would the limitations of Section 217 be ineffective, but the very enactment of Section 217 would be superfluous.

[9] This case is pending on appeal before the Sixth Circuit, No. 18,284.

sioner, decided June 8, 1966 (25 T.C.M. 636); *Wilson* v. *Commissioner, supra.* Any loss on the sale of the residence would have been personal and thus, nondeductible. IBM's payment of the excess of the "appraised value" of the house over its "net selling price" was not part of the amount realized from its sale. Petitioner received the payment only because the proceeds from the sale itself fell short of the guaranteed amount, but no interest in the property passed to IBM.

Moreover, the payment reflected not the difference between the selling price of the house and its true value, but between the net proceeds and an "appraised value" that simply turned out to be too high. Since the house had been on the market for six months, the price petitioner received for it presumably reflected its true market value.[10]

The question here is essentially the same as that involved in *Commissioner* v. *LoBue,* 351 U.S. 243. There the employer allowed the employee to purchase property (common stock) at a price below its market value. Here, the employer guaranteed to pay an amount above the market value of property (the residence) that its employee was selling. In either case, the employer's commitment to give the employee the benefit

[10] Petitioner is incorrect in stating (Pet. 9) that there was a forced sale of the house. It was on the market for six months, with four different real estate brokers, as well as petitioner himself trying to sell it at a price higher than the eventual selling price (Tr. 94–95, 112, 114; Joint Ex. 62; Pet. 36a). The actual selling price was $1,550 above one of the three appraisals obtained under IBM's Home Guarantee Policy (Pet. 34a–36a).

of a price more favorable than the market price gives rise to ordinary income to the employee.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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